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No. 82-5466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD G. WELSH

Petitioner,

—v.—

THE STATE OF WISCONSIN

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

BRIEF FOR THE WISCONSIN CIVIL LIBERTIES UNION FOUNDATION AS *AMICUS CURIAE*

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INTEREST OF *AMICUS CURIAE*

The Wisconsin Civil Liberties Union Foundation is a nonpartisan Wisconsin organization dedicated to preserving and protecting the liberties safeguarded by the United States Constitution and its Bill of Rights. It is associated with the Wisconsin Civil Liberties Union, a 4,000 member organization which is the Wisconsin state affiliate of the American Civil Liberties Union.

This case presents serious questions regarding the strength of the Fourth Amendment protection against unreasonable searches and seizures, a provision of critical importance to our Bill of Rights.

Written consent of the parties for the filing of this brief *amicus curiae* has been supplied to this Court.

SUMMARY OF ARGUMENT

Warrantless searches and seizures are presumatively unreasonable under the Fourth Amendment. The home is especially protected from government intrusion. Exceptions to the warrant requirement are jealously and carefully drawn.

Warrantless home entries are allowed only in exigent circumstances. Exigency may exist where the nature of the intrusion is minor compared to the need for the protection of the community which the search or seizure seeks to accomplish. Even then, the intrusion is justified only if it is imperative in order to achieve the community protection.

An appropriate measure of the relative importance of the community objective which the intrusion seeks to protect is the classification of a law violation as a felony, misdemeanor, "petty" misdemeanor, or forfeiture action. Unless this Court

would allow the exceptions to swallow the rule of the Fourth Amendment, no warrantless police intrusion of a private home can be justified merely to preserve evidence for use in a civil forfeiture action.

Furthermore, under Wisconsin law, no magistrate has the authority to issue an arrest warrant for the violator of a non-criminal law, absent a showing that the defendant would fail to appear in response to a summons. It would be perverse to allow the police to invade a private residence without judicial authorization under circumstances in which no judicial authorization could legally be obtained.

The Fourth Amendment would be seriously weakened were police allowed into private homes absent consent and without a warrant for the purpose of

preserving evidence that a non-criminal law violation has occurred. The people would no longer be secure in their houses because government agents would be free to conduct searches and seizures in the home upon probable cause that a resident had exceeded posted speed limits or spit on the sidewalk, if the officer thought the "identity" of the perpetrator had to be learned to be preserved.

ARGUMENT

Edward G. Welsh was at home, undressed in his bed when two police officers entered his upstairs bedroom to arrest him for drunk driving. Mr. Welsh was accused of having operated an automobile while intoxicated earlier that evening. (J.A. 44, 46). The police officers had not observed the driving; they were acting on the report of a citizen witness. (J.A. 32, 33). The officers had no warrant for the arrest of Mr. Welsh, and no warrant to search for evidence of any offense. (J.A. 14).

In Wisconsin, driving under the influence of an intoxicant is a non-criminal offense, the violation of which subjects an individual to a money forfeiture. Only if the violator has been previously convicted of an intoxicated driving offense within the last

five years does the current matter become criminal in nature. For the second and subsequent offense within five years, the violation is a misdemeanor, subjecting the defendant to a fine and imprisonment up to one year. This statutory arrangement was in effect at the time of Mr. Welsh's arrest, and remains in effect today. Wis. Stat. Ann. §346.63(1)(a) and 346.65(2).

The record in this case indicates nothing to suggest that the officers who arrested Mr. Welsh in his bedroom had reason to believe Welsh had previously been convicted for driving while intoxicated. (J.A. 46). The only inference which this record supports is that Mr. Welsh was arrested as a violator of a non-criminal traffic regulation.

I. THE FOURTH AMENDMENT PROTECTS BASIC SOCIETAL VALUES OF INDIVIDUAL FREEDOM AND LIBERTY

The Bill of Rights protects the precious heritage of individual freedom and personal liberty for the people of the United States. This Court has referred to the Fourth Amendment protection against the warrantless police intrusion into private living quarters as

> "one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

Johnson v. United States, 333 U.S. 10, 17 (1948).

The Fourth Amendment stands as a barrier to shield people from improper intrusions by agents of government. The language of this Amendment is absolute in its guarantee that the right of

security in one's home against unreasonable searches and seizures "shall not be violated". U.S. Const. amend. IV.

Interpreting the word "unreasonable" in the Fourth Amendment, this Court has unyieldingly held that searches and seizures executed on private property without a warrant are presumptively unreasonable. Camara v. Municipal Court, 387 U.S. 523, 528, 529 (1967), Mincey v. Arizona, 437 U.S. 385, 390 (1978).

The personal security protections of the Fourth Amendment "should be liberally construed", Boyd v. United States, 116 U.S. 616, 635 (1886), and relief from the warrant requirement is available only "in a few 'jealously and carefully drawn' exceptional circumstances". United States v. Watson, 423 U.S. 411, 427 (1976) (Powell, J., dissenting) (citations omitted).

Because of the importance of the "right of privacy as one of the unique values of our civilization", McDonald v. United States, 335 U.S. 451, 453 (1948) warrants are always required for home entries by police unless the situation evidences a "grave emergency". McDonald v. United States, 335 U.S. at 455. The absence of a warrant cannot be excused

> "without a showing by those who seek exemption from constitutional mandate that the exigencies of the situation made that course imperative."

McDonald v. United States, 335 U.S. at 456.

In enforcing the guarantees of the Fourth Amendment, this Court has given special recognition to "the sanctity of private dwellings". United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976). Examination of the purpose and history of this constitutional provision reveals that "physical entry of the

home" by police or other government agents "is the chief evil against which the wording of the Fourth Amendment is directed". United States v. United States District Court, 407 U.S. 297, 313 (1972).

In 1961 the Opinion of a unanimous Court called upon the "long history" of the Fourth Amendment and stated:

> "At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Silverman v. United States, 365 U.S. 505, 511 (1961). More recently this Court has maintained its insistence that one's home be generally regarded as a safe haven.

> "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and

> specific constitutional terms, ... In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house."

Payton v. New York, 445 U.S. 573, 589, 590 (1980).

II. WARRANTLESS NON-CONSENSUAL POLICE ENTRIES INTO PRIVATE HOMES AT NIGHT TO PRESERVE EVIDENCE OF NON-CRIMINAL TRAFFIC VIOLATIONS ARE NOT JUSTIFIED.

Respondent would justify the unwelcome visit of the police to Mr. Welsh's bedroom as being required by the exigencies of the situation. It is claimed that evidence of Mr. Welsh's alleged drunk driving would dissipate over time if the Constitution interfered with an immediate arrest. Assuming, *arguendo*, evidence would diminish if the officers took time in an attempt to secure a

warrant, the warrantless, non-consensual entry is still not legitimate.

A balancing test is used to judge, categorically, the validity of searches and seizures in various situations.

> "...the constitutionality of a particular search is a question of reasonableness and depends on 'a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers'"

Mincey v. Arizona, 437 U.S. 385, 406 (separate opinion of Rehnquist, J.) (1978), quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

In the instant case, the state seeks indicia of drunk driving in the form of blood alchohol level test results. The public interest in obtaining this additional evidence for use in a non-criminal, traffic regulation forfeiture action is overwhelmed by the importance of the protection which the Fourth

Amendment guarantees, in light of the severity of the governmental intrusion upon personal liberty here.

Repeatedly, this Court has pointed out the significance and public importance of felony matters as compared to non-felonies. On the precise question of police authority to make warrantless arrests, this distinction is clearly drawn.

> "Under the English common law, a police officer had power without a warrant to arrest persons committing a misdemeanor in the officer's presence and persons whom the officer had reasonable cause to believe had committed a felony. This rule, which had its origin in the ancient formative period of the common law, was firmly established at the time of the adoption of the Fourth Amendment."

Trupiano v. United States, 345 U.S. 699, 713 (Vinson, C.J. dissenting) (1948). Even prior to Trupiano, the reasoning behind the felony/misdemeanor distinction

was discussed by the Court. In Carroll v. United States, 267 U.S. 132 (1925) this Court stated:

> "The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace ... while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant (citation omitted)."

Carroll v. United States, 267 U.S. at 157.

Warrantless daylight arrests in public places were upheld in United States v. Watson, 423 U.S. 411 (1976). Sanction by this Court of such arrests was predicated on the felony status of the offense. A "constitutional standard" was recognized that a warrantless arrest may be made "where there are reasonable grounds to believe that the person to be arrested has committed a felony."

United States v. Watson, 423 U.S. at 417. The dissent in Watson exposed the importance of the felony/non-felony distinction. Justice Marshall, dissenting, acknowledged the common law rule that a warrantless arrest may be made for a felony upon probable cause. Justice Marshall argued, however, that the definition of "felony" has changed.

> "Only the most serious crimes were felonies at common law, and many crimes now classified as felonies under federal or state law were treated as misdemeanors"

United States v. Watson, 423 U.S. at 439, 440.

The clear language of Watson, both majority and dissent, shows that this Court has never authorized the warrantless arrest of a non-felony suspect for an offense committed outside the presence of the officer. No such arrests have ever been authorized, even in public places, in broad daylight.

Respondent would mutilate the Fourth Amendment by giving beat officers the right to barge literally into our bedrooms for lesser law violations than even misdemeanors.

Notwithstanding its status as a non-criminal offense, drunk driving is a serious problem. No one disputes the "well documented" "carnage caused by drunk drivers". South Dakota v. Neville, ___ U.S. ___, 103 S.Ct. 916, 920, 74 L.Ed.2d 748, 51 U.S.L.W. 4148, (February 22, 1983).

Nevertheless, the people of Wisconsin have chosen to designate drunk driving as a non-jailable offense and to designate repeat offenses as misdemeanors. Wis. Stat. §346.63(1), 346.65(2). In a different context, this Court has addressed the importance and meaning of society's determination of the maximum

possible penalty for a particular violation.

> "In deciding whether an offense is 'petty', we have sought objective criteria reflecting the seriousness with which society regards the offense, ... and we have found the most relevant such criteria in the severity in the maximum authorized penalty."

Baldwin v. New York, 399 U.S. 66, 68 (1970) (citations omitted).

> "The penalty authorized by law of the locality may be taken 'as a gauge of its social and ethical judgements' ... of the crime in question."

Duncan v. Louisiana, 391 U.S. 145, 160 (1968) (citation omitted).

It would be wholly inappropriate for this Court to make a "drunk driving exception" to the rule forbidding non-felony warrantless arrests for violations which occur outside the officer's presence. That issue, however, need not be reached in this case. Here, the

walls of the private residence protect the individual even from a warrantless felony arrest absent a "compelling need" for an immediate entry. Payton v. New York, 445 U.S. 573 (1980), Michigan v. Tyler, 436 U.S. 499, 509 (1978).

The governmental interest which could be served by allowing the police to arrest alleged drunk drivers at home in their beds is not concurrent with or equal in magnitude to the public interest in generally getting drunk drivers off the road. The only possible value in allowing officers to violate the sanctity of a suspect's home is the incremental additional ability to prosecute those few people who may be arrested in this unusual manner. Although there should be grave concern that this police tactic will be used all too often, the effect on society's ability to

protect itself from drunk drivers must be minimal.

Ironically, had the officer in this case sought a warrant for the arrest of Mr. Welsh upon the non-criminal charge of driving while intoxicated, no such warrant could have been legally issued. Wisconsin's criminal procedure code requires that a summons be used instead of an arrest warrant where the maximum possible penalty is six months imprisonment or less. Wis. Stat. §968.04(2)(b). Wisconsin's traffic code requires that, for issuance of warrants, the criminal code provisions be followed. Wis. Stat. §345.21(1).

The relevant statutes have remained unchanged since the time of Mr. Welsh's arrest, and are set forth below:

> 345.21 AUTHORITY TO ARREST WITH A WARRANT. (1) A person may be arrested for the violation of a traffic regulation

> with a warrant that substantially complies with ch. 968. Except as provided in sub. (2), the person arrested shall be brought without unreasonable delay before a court having jurisdiction to try the action or a judge.

Wis. Stat. §345.21(1).

> 968.04 WARRANT OR SUMMONS ON COMPLAINT.
>
> . . .
>
> (2)(b) In misdemeanor actions where the maximum imprisonment does not exceed 6 months, the judge shall issue a summons instead of a warrant unless he believes the defendant will not appear in response to a summons.

Wis. Stat. §968.04(2)(b).

To allow government agents to accomplish without judicial scrutiny what would be unavilable by court order would be perverse.

Even under Justice White's dissenting opinion in Payton v. New York, 445 U.S. 573, 603 (1980), which would have established four independent

requirements for the validity of home arrests, the entry here would be unconstitutional.

> "These four restrictions on home arrests — felony, knock and announce, daytime, and stringent probable cause — constitute powerful and complimentary protections for the privacy interests associated with the home. The felony requirement guards against abusive or arbitrary enforcement and ensures invasions of the home occur only in case of the most serious crimes. The knock-and-announce and daytime requirements protect individuals against the fear, humiliation, and embarrassment of being aroused from their beds in states of partial or complete undress. And these requirements allow the arrestee to surrender at his front door, thereby maintaining his dignity and preventing the officers from entering other rooms of the dwelling."

Payton v. New York, 445 U.S. at 616, 617.

Although probable cause is not an issue on this appeal, it is doubtful whether Justice White's "stringent probable cause" is supported in the

record below. State v. Welsh, 108 Wis. 2d 319 at 345-352, 321 N.W.2d 245, 258-262 (1982)(Abrahamson, J., dissenting). It is undisputed that this arrest was not for a felony and not during daytime. Furthermore, the officers did not allow Mr. Welsh to surrender at his front door and nothing was done to protect him from the "embarrassment of being aroused from" his bed in a state of complete undress.

Under these circumstances, the hope of preserving a bit of evidence for a forfeiture action trial cannot overcome the presumption that the warrantless entry was unreasonable.

III. THE PEOPLE WOULD BE STRIPPED OF THEIR EXPECTATION OF PRIVACY IN THE HOME WERE WARRANTLESS ENTRIES ALLOWED FOR NON-CRIMINAL ARRESTS.

A United States Supreme Court decision upholding the validity of Mr. Welsh's arrest would shatter the Fourth Amendment. Police could enter any home at any time of the day or night looking for evidence which might disappear if they didn't act quickly.

Agents of government will swiftly find "exigencies" in almost any situation. An immediate home entry might be required to learn the identity of an individual observed driving a vehicle in excess of posted limits, or someone who had been seen by a third party spitting on the sidewalk. The officer will maintain that, absent an immediate identification, the suspect would change clothes and the valuable evidence would be lost.

Governmental bodies or public interest groups may place advertisements on television and in newspapers suggesting that citizens "turn in a drunk driver". Good Samaritans would get the license number of a vehicle driven erratically and call the "drunk driving hot line". After learning the witness' story, police might well invade the home of the person to whom the vehicle is registered. Would the officers stand at the front door and request to meet the vehicle owner? At the Welsh home, they barged right in. Affirmance of the court below would authorize regular nighttime room-to-room home searches by officers seeking drunk driving suspects.

In balancing any warrantless governmental intrusion onto private property, the measuring begins with the scales tipped in favor of privacy. Added to this is the weight of the

special protection afforded by a personal residence, for the balancing required in this case.

On the other side of the scale is placed the "public interest" to be served by allowance of such nighttime home searches and seizures. But on these facts the scales never move.

> "[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home."

Jones v. United States, 357 U.S. 493, 498 (1958).

The privacy interests are so strong and the public value of the intrusion is so minimal that the balance cannot be tipped. The right of privacy must prevail.

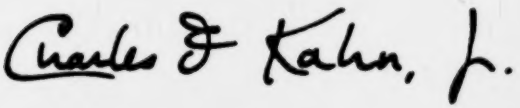
CONCLUSION

The Wisconsin Civil Liberties Union Foundation supports the position of petitioner Edward G. Welsh.

The relief we are seeking is reversal of the Wisconsin Supreme Court and remand of the case to the trial court.

Respectfully submitted,

WISCONSIN CIVIL LIBERTIES UNION FOUNDATION



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